(2)

Supreme Court, U.S.
FILED
MAY 13 2005
OFFICE OF THE CLERK

No. 04-1384

In The

Supreme Court of the United States

JUNE CARABELL, *ET AL.*

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONER

Duane J. Desiderio
(Counsel of Record)
Thomas J. Ward
Felicia K. Watson
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 866-8200

TABLE OF CONTENTS

Page

Interest of *Amicus Curiae* 1

Summary of the Argument 2

Argument 4

I. This Court Should Resolve the Circuit Split on the Scope of CWA Jurisdiction Over Non-navigable Features. 4

A. As the Sixth Circuit Previously Recognized, Determining the "Precise Boundary" of Areas Covered by the Clean Water Act Remains "Difficult." 5

B. Sixth Circuit: "Mere Proximity" to Non-Navigable Ditches That May be Connected to Navigable Water. 6

C. Fourth and Sixth Circuits: "Hydrological Connection" to Navigable Waters. 8

D. Fifth Circuit: "Actually Navigable Waters" and Waters "Truly" Adjacent to Them. 10

E. Second Circuit: "Actual Discharge" of Pollutants to Navigable Waters. 12

II. The Confusion Created by the Regulatory Agencies in the Field Should Compel This Court's Involvement. 15

A. Congress Has Recognized the Agencies' Haphazard Implementation of "Navigable Waters" Jurisdiction. 15

B. The General Accounting Office Has Reported on Rampant Regulatory Inconsistencies. 18

C. Whether Federal Regulators Assert CWA Jurisdiction Now Depends on the Geographic Jurisdiction of the Various Courts of Appeal, Not on a Consistent Regulatory Program. 19

Conclusion 20

TABLE OF AUTHORITIES

CASES Page(s)

Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995) 14

Carabell v. U.S. Army Corps of Eng'rs, 391 F.3d 704 (6th Cir. 2004), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. April 11, 1005) (No. 04-1384) 5

Carabell v. U.S. Army Corps of Eng'rs, 257 F. Supp. 2d 917 (E.D. Mich. 2003) 6, 8

Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 19

FD&P Enterprises, Inc. v. U.S. Army Corps of Eng'rs, 239 F. Supp. 2d 509 (D. N.J. 2003) 11

In re Needham, 354 F.3d 340 (5th Cir. 2003) 10

Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001) 10, 11, 12

Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) ..... *passim*

Treacy v. Newdunn Assocs., LLP, 334 F.3d 416 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1874 (2004) 5

United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1874 (2004) 4, 8, 9, 10, 13, 14, 17, 19

United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 1875 (2004) 5, 8, 9, 10

United States v. Rapanos, 376 F.3d 629 (6th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3466 (U.S. January 28, 2005) (No. 04-1034) 5, 8, 9, 10

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 5, 6, 7, 8, 10, 11

United States v. Rueth Dev. Co., 335 F.3d 598 (7th Cir.), *cert. denied*, 540 U.S. 1050 (2003) 5

Waterkeeper Alliance, Inc. v. U.S. Envtl. Protection Agency, 399 F.3d 486 (2d Cir. 2005) 12, 13

STATUTES

33 U.S.C. § 1311 2

33 U.S.C. § 1342 12

33 U.S.C. § 1344 12

33 U.S.C. § 1362 ..... 2, 12

REGULATIONS

Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (January 15, 2003) 16, 18

OTHER

Agency Implementation of the SWANCC Decision: Hearing Before the Subcomm. on Energy Policy,

Natural Resources & Regulatory Affairs of the Comm. on Gov' Reform, No. 107-230, 107th Cong. 2d Sess. (2002) 15, 16

Brief of *Amici Curiae* of the Building Industry Legal Defense Foundation, *et al.* in Support of Petitioners, *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed*, 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701) 16

Petition for Writ of *Certiorari*, *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed*, 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701)... 13, 14

Press Release, Environmental Protection Agency & U.S. Army Corps of Engineers, EPA and Army Corps Issue Wetlands Decision (December 16, 2003) 17

U.S. General Accounting Office, Report to the Chairman, Subcomm. on Energy Policy, Natural Resources & Regulatory Affairs, Comm. on Gov't Reform, House of Representatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 (Feb. 27, 2004) 4, 18, 19

W. Page Keeton et al., *Prosser and Keeton on Torts* §§ 41-42 (5th ed. 1984) 14

INTEREST OF THE *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of Petitioner. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 220,000 builder and associate members throughout the United States. Its members include not only individuals and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. NAHB is the voice of the American shelter industry. Through the regular course of operating their businesses, NAHB's members are frequently subject to regulations under the Clean Water Act ("CWA"). In that regard, NAHB has developed comprehensive familiarity with the CWA's permitting requirements, advises its members on compliance issues, and, unfortunately, has been witness to numerous situations where federal regulators have attempted to expand the scope of their authority beyond congressionally authorized parameters. NAHB has thus been before the Court as *amicus curiae* or "of counsel" in a number of cases involving landowners who have been aggrieved by government over-regulation under the CWA and other statutes and programs.[2]

---

[1] Pursuant to Rule 37.6 of this Court, NAHB states that its counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

[2] These include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v.*

SUMMARY OF THE ARGUMENT

1. ***Circuit Conflict:*** There is a conflict between the courts of appeal on the proper test for determining when a non-navigable feature is a "navigable water"[3] under the Clean Water Act ("CWA" or the "Act").

• The Sixth Circuit, in its decision below, has upheld the authority of the U.S. Army Corps of Engineers ("Corps") over a non-navigable wetland simply because it was near non-navigable ditches that may be connected to navigable waters. Under this "mere proximity" approach – which

---

Yolo County, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Fal', v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *Kelo v. City of New London*, 843 A.2d 500 (Conn.), *cert. granted*, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04-108); *Lingle v. Chevron U.S.A., Inc.*, 363 F.3d 846 (9th Cir.), *cert. granted*, 125 S. Ct. 314 (U.S. Oct. 12, 2004) (No. 04-163); and *San Remo Hotel, L.P. v. City & County of San Francisco*, 364 F.3d 1088 (9th Cir.), *cert. granted in part*, 125 S. Ct. 685 (U.S. Dec. 10, 2004) (No. 04-340).

[3] Unless permitted, the CWA prohibits discharges of pollutants from point sources into "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12). "Navigable waters" is defined to mean "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

stretches CWA jurisdiction far beyond the limits of any prior court of appeals decision (including the Sixth Circuit's past precedents) – there is no need for the Corps to prove any surface hydrological connection between wetlands and navigable waters, or that the wetlands are physically adjacent (*i.e.*, touching) navigable waters. It is simply enough for the Corps to show that wetlands were somewhere in the vicinity of surface aquatic features, as the basis to prop-up CWA jurisdiction.

- On other occasions, the Sixth Circuit has followed the Fourth Circuit's "hydrological connection" theory for CWA jurisdiction. Under this approach, the Corps and the Environmental Protection Agency ("EPA") assert authority over non-navigable features like ordinary ditches, drains, and swales, merely if they have some "hydrological connection" to navigable waters. As a practical matter, the hydrological connection theory supports an expansive, virtually limitless basis for CWA jurisdiction; it enables federal regulators to control non-navigable features in the landscape, simply if a drop of water in them could, potentially, reach navigable waters.

- The Fifth Circuit has expressly rejected the "hydrological connection" theory as the basis for CWA jurisdiction. Instead, it requires a "direct, proximate" connection between non-navigable and navigable waters, and has thus extended CWA jurisdiction only if a water is actually navigable or physically adjacent thereto.

- The Second Circuit takes another approach. It recently held that the assertion of federal CWA jurisdiction requires the showing of an "actual discharge" of pollutants into navigable waters. It thus requires more than physical proximity or a "hydrological connection" to navigable

waters, but does not restrict CWA jurisdiction to actually navigable waters and abutting non-navigable features.

2. ***Regulatory Confusion:*** Not surprisingly, the split in the courts has manifested itself as chaos in the field. According to a report issued by the United States General Accounting Office,[4] "three different district staff" of the Corps would likely make "three different assessments" as to whether a particular non-navigable feature (like a drainage ditch or a dry wash) is subject to CWA jurisdiction. *See* GAO Report at 23. With no guidance forthcoming from the Corps or EPA, this Court is the only realistically available forum to make sense of the judicial quagmire and explain to landowners and regulatory agencies what kinds of non-navigable features fall within (and outside) the CWA.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON THE SCOPE OF CWA JURISDICTION OVER NON-NAVIGABLE FEATURES.

Since the decision in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"), five petitioners, in six separate petitions, have sought assistance from this Court on the extent to

---

[4] U.S. General Accounting Office, Report to the Chairman, Subcomm. on Energy Policy, Natural Resources & Regulatory Affairs, Comm. on Gov't Reform, House of Representatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 (Feb. 27, 2004) ("GAO Report").

which the CWA encompasses non-navigable features as statutory "navigable waters."[5]

A. As the Sixth Circuit Previously Recognized, Determining the "Precise Boundary" of Areas Covered by the Clean Water Act Remains "Difficult."

Just prior to its decision in *Carabell*, the Sixth Circuit went to great lengths to identify and discuss the contradictory appellate cases on CWA jurisdiction. *United States v. Rapanos*, 376 F.3d 629, 638-42 (6th Cir. 2004) (*Rapanos II*). That decision pointedly recognized that determining the "precise boundary of which waters are covered by the CWA has been difficult." *Rapanos II*, 376 F.3d at 636.[6] The court of appeals believed that *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and *SWANCC*, "the two leading Supreme Court cases on the reach of the CWA[,] have done little to clear the muddied waters of CWA jurisdiction." 376 F.3d at 365.

---

[5] *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704 (6th Cir. 2004), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. April 11, 2005) (No. 04-1384); *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3466 (U.S. January 28, 2005) (No. 04-1034) ("*Rapanos II*" (civil appeal)); *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 1875 (2004) ("*Rapanos I*"(criminal appeal)); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1874 (2004) ("*Deaton*"); *Treacy v. Newdunn Assocs., LLP*, 344 F.3d 416 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1874 (2004); *United States v. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir.), *cert. denied*, 540 U.S. 1050 (2003).

[6] "Determining which wetlands are considered 'adjacent to' traditional navigable waters or their tributaries has proved to be a complication in defining CWA jurisdiction." 376 F.3d at 636. And again, the court of appeals stated: "Determining how much of a connection is necessary has proven difficult." *Id.*

What this Court meant by "adjacent" in *Riverside Bayview*, and "significant nexus" in *SWANCC*, have become the million dollar questions confronting the lower courts as they grapple with deciding whether and when the CWA encompasses non-navigable features.

B. Sixth Circuit: "Mere Proximity" to Non-Navigable Ditches That May be Connected to Navigable Water.

Aside from the Sixth Circuit's decision below, none of the courts of appeals has ever held that mere proximity alone between a wetland and a non-navigable ditch provides the basis for CWA jurisdiction—without some kind of hydrological connection between those features and navigable waters. In *Carabell*, the record showed that the forested wetlands were separated by a "clay ridge [which] prevent[ed] water from the forested area of the property from draining into the ditch." 257 F. Supp. 2d at 919. It was "undisputed that the property does not have a surface water connection to any adjacent property or any adjacent body of water," and that "the water that is periodically present in the forested portion of the property does not drain to the Sutherland-Oemig drain or to any body of water...." (*Id.*) Furthermore, the district court found it was "crucial to the [administrative law judge's] ruling that *the property was isolated from any body of water.*" *Id.* (emphasis supplied).

Despite the *Carabell* wetland's isolation from any water, the Corps contended that "*SWANCC* does not hold that a direct hydrological connection is required to establish jurisdiction based on adjacency." *Id.* at 927-28. In effect, the Corps asserted jurisdiction over the wetlands merely

because they were *near* non-navigable waters, not because of any hydrologic connection between them. Both the district court and the court of appeals upheld the Corps's authority in this case based on the "mere proximity" theory.

However, neither *Riverside Bayview* nor *SWANCC* support the "mere proximity" theory. The *Riverside Bayview* Court upheld jurisdiction over "adjacent" wetlands because it discerned a congressional intent to regulate wetlands that are "inseparably bound up with the 'waters of the United States.'" 474 U.S. at 134. The Court emphasized that the wetlands in that case, described as "80 acres of low-lying marshy land," "actually abut[ted] on a navigable waterway," Black Creek. *Id.* at 124, 135. The *SWANCC* Court also stressed that the *Riverside Bayview* wetlands "actually abutted on a navigable waterway," and further observed that its' holding in *Riverside Bayview* "was based in large measure on Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters." *SWANCC,* 531 U.S. at 167. *SWANCC* reinforced the need for an "inseparable" relationship between non-navigable and navigable resources: "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes.*" *Id.* (emphasis added). Accordingly, finding no inseparable relationship between the non-navigable, isolated ponds at issue in *SWANCC* and a body of "open water," this Court held that the Corps's claim of jurisdiction "exceeds the authority granted to [the Corps] under Section 404(a) of the CWA." *Id.* at 174.

In short, the assertion of CWA jurisdiction over the wetlands at issue in this case contravenes both *Riverside Bayview* and *SWANCC.* Unlike the jurisdictional wetlands

in *Riverside Bayview,* the *Carabell* wetlands do not actually abut an open water. For that matter, the *Carabell* wetlands do not actually abut a non-navigable water, either. And like the non-jurisdictional ponds in *SWANCC,* the *Carabell* wetlands are physically isolated from other surface aquatic features (here, by a berm) and thus lack the requisite "significant nexus" to navigable waters.

C. Fourth and Sixth Circuits: "Hydrological Connection" to Navigable Waters.

In an earlier opinion (that is also the subject of a pending petition for writ of *certiorari*), the Sixth Circuit followed the Fourth Circuit in extending CWA jurisdiction to all areas with "the presence of a hydrologic connection." *Rapanos II,* 376 F.3d at 639 (citing with approval *United States v. Rapanos,* 339 F.3d 447, 453 (6th Cir. 2003), and *United States v. Deaton,* 332 F.3d 698, 711-12 (4th Cir. 2003)). It further held: "Non-navigable waters must have a *hydrological connection or some other 'significant nexus'* to traditional navigable waters in order to invoke CWA jurisdiction." *Rapanos II,* 376 F.3d at 642 (emphasis added).

As in the present case,[7] in *Deaton* and *Rapanos I* and *II*, the Corps asserted federal authority over remote drainage ditches that were miles away from navigable waters. *Deaton,* 332 F.3d at 712; *Rapanos I,* 339 F.3d at 452-53. Both circuits have accepted as proper the Corps's apparent unrestricted ability to exert regulatory jurisdiction

---

[7] The Carabells' property is some distance away from navigable-in-fact waters and more fully described in the district court's opinion. *See, e.g., Carabell v. U.S. Army Corps of Eng'rs,* 257 F. Supp. 2d 917, 918-19 (E.D. Mich. 2003).

"over the whole tributary system of any navigable waterway []." *Deaton*, 332 F.3d at 712; *Rapanos I*, 339 F.3d at 452-53. In *Deaton*, for example, the Fourth Circuit reasoned that "any branch of a tributary system [including ditches] that *eventually flows* into a navigable body of water" is subject to CWA requirements. 332 F.3d at 711, 712 (emphasis added). Similarly, in *Rapanos I*, the Sixth Circuit held that there was "an ample nexus to establish jurisdiction" because Mr. Rapanos's wetlands were "adjacent" to a drain and a river – "adjacent" not because of any physical proximity to navigable-in-fact waters, but by virtue of a remote and distant hydrological connection between the wetlands and navigable-in-fact waters. *Rapanos I*, 339 F.3d at 453. In *Rapanos II*, the Sixth Circuit stayed its course and again adopted the Fourth Circuit's "eventually flows" analysis from *Deaton*. *Rapanos II*, 376 F.3d at 639-40 (citing *Deaton*, 332 F.3d at 711-12).

In short, the Fourth and Sixth Circuits have justified federal CWA regulation simply upon *the potential* that a single molecule of water could be emitted from a non-navigable feature and traced across the landscape, so that it *may flow* into a traditional navigable water. Under this theory, it is irrelevant whether the connection between non-navigable features and navigable waters is continuous; whether that connection is natural or man-made; whether the connection is at the surface or subterranean; how long that connection is; whether pollutants traverse through a hydrologic connection and ultimately flow into navigable waters; or, for that matter, whether, when, or how much water exists in such a connection. Under the Fourth and Sixth Circuits' view, jurisdiction is supported by a limitless "hydrological connection" theory.

Thus, while the major premise underlying *Riverside Bayview* and *SWANCC* is a "significant nexus" to navigable waters, the "hydrological connection" theory is premised on something less. The purposeful choice of words selected by the Fourth and Sixth Circuits disserves, both textually and substantively, this Court's "significant nexus" requirement. In *Deaton*, the Fourth Circuit found "*a* nexus" sufficient, reading *SWANCC* as "*suggesting* that covered non-navigable waters are those with *'some connection'* to navigable ones." *Deaton*, 332 F.3d at 709 (emphasis supplied). *Rapanos I*, relying heavily on *Deaton*, found an "ample nexus" sufficient. *Rapanos I*, 339 F.3d at 453. In *Rapanos II*, the Sixth Circuit approved these previous holdings. 376 F.3d at 642. However, this Court never premised CWA jurisdiction on "a" nexus, "some" connection, "eventual[] flows" or a "hydrologic connection." Instead, this Court applied the "significant nexus" doctrine.

D. Fifth Circuit: "Actually Navigable Waters" and Waters "Truly" Adjacent to Them.

Contrary to its sister circuits in *Deaton* and *Rapanos I* and *II*, the Fifth Circuit has issued decisions more faithful to *SWANCC* and *Riverside Bayview*. On two occasions, the Fifth Circuit has flatly rejected the Corps's overbroad interpretation that CWA navigable waters encompass "all waters ... that have any hydrological connection with 'navigable water.'" *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003) ("*Needham*") (citing 40 C.F.R. § 300.5 (2003)). *See also Rice v. Harken Exploration Co.*, 250 F.3d 264, 269-70 (5th Cir. 2001) ("*Rice*"). Recognizing that the Fourth Circuit in *Deaton*, 332 F.3d at 702, and the Sixth Circuit in *Rapanos I*, 339 F.3d at 449, agreed with the

government's "expansive treatment," the Fifth Circuit countered by holding as follows:

> In our view, [the government's] definition [of "navigable waters"] is unsustainable under *SWANCC*. The CWA ... [is] not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor *truly adjacent* to navigable waters. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* "a body of water is subject to regulation ... *if the body of water is actually navigable or adjacent to an open body of navigable water.*"

Needham, 354 F.3d at 345-46 (internal citations omitted, emphasis added) (citing *Rice*, 250 F.3d at 269). *See also FD&P Enters., Inc. v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 2d 509, 516 (D. N.J. 2003) (holding proper analysis is the "significant nexus" test and expressly rejecting "hydrological connection" test).

Needham entrenches the view earlier announced by the Fifth Circuit in *Rice*, where it interpreted *SWANNC* and *Riverside Bayview* and held that "a body of water is subject to [CWA] regulation ... if the body of water is actually navigable or adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. The *Rice* court found nothing to indicate that the creek at issue, or other unnamed intermittent creeks, were "sufficiently linked" to navigable-in-fact water. *Id.* at 271. The Fifth Circuit thus held that there must be "a close, direct and proximate link between ... [the] discharges of oil and any resulting actual, identifiable

oil contamination of natural surface water that satisfies the jurisdictional requirements of the [CWA]." *Id.* at 272.

Moreover, *Needham* reaffirmed the Fifth Circuit's *actual* adjacency requirement from *Rice,* when it held "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. Rather, adjacency necessarily implicates a 'significant nexus' between the water in question and the navigable-in-fact waterway." *Needham,* 354 F.3d at 346 and n.12 (citing *SWANCC,* 531 U.S. at 167; identifying the Corps's definition of "adjacent" as "bordering, contiguous, or neighboring" in 33 C.F.R. § 328.3, and recognizing partial invalidation of that regulation by *SWANCC*).

E. Second Circuit: "Actual Discharge" of Pollutants to Navigable Waters.

The Second Circuit Court of Appeals has recently offered another mode of analysis to determine the extent of CWA jurisdiction. In *Waterkeeper Alliance, Inc. v. U.S. Envtl. Protection Agency,* 399 F.3d 486 (2d Cir. 2005), the court reviewed an EPA rule establishing CWA Section 402 permit requirements for discharges of water pollutants from concentrated animal feeding operations (the "CAFO Rule"). Industry groups brought a facial challenge, arguing that the CAFO Rule was illegal because it sought to establish a duty to apply for a Section 402 permit[8] simply for a *potential* to

---

[8] The Act's main permit provisions are Sections 402 and 404. Section 402 requires permits for the discharge of pollutants. 33 U.S.C. § 1342. Section 404 requires permits for the discharge of a specific type of pollutant, namely, dredged or fill material. *Id.* § 1344. The jurisdictional polestar for both permits is a "discharge," which means "any addition of any pollutant into *navigable waters*...." 33 U.S.C. § 1362(12) (emphasis supplied).

discharge pollutants. *Id.* at 504. The Second Circuit found that the CAFO Rule violated the CWA's statutory scheme because:

> In the absence of an *actual addition* of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, ... and no statutory obligation of point sources to seek or obtain [a CWA] permit in the first instance.

Id. at 505 (emphasis supplied).

Thus, the Second Circuit emphasizes that the requirement to obtain a CWA permit depends on an *actual* discharge of pollutants to navigable waters, not a mere hydrological connection to navigable waters. In other words, it is not simply the *possible* addition of *water* to "navigable water," but the *actual* addition of *pollutants* to "navigable water," that triggers CWA permitting requirements in the Second Circuit.

The "actual discharge" standard from *Waterkeeper Alliance* is at odds with *Deaton*, where the Fourth Circuit upheld federal jurisdiction on the reasoning that a discharge of pollutants into a non-navigable ditch "*has the potential* to move downstream and degrade the quality of the navigable waters themselves." *Deaton*, 332 F.3d at 707 (emphasis supplied); *id.* at 711 (CWA jurisdiction "extends to any branch of a tributary system that eventually flows into a navigable body of water"). As the petition for *certiorari* to this Court in *Deaton* made clear, "there [was] nothing in the record to suggest that dirt from the Deatons' ditch-digging ... reached and degraded the Wicomico River." Petition for Writ of *Certiorari* at 8, *United States v. Deaton*, 332 F.3d

698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701). For that matter, there was no evidence in *Deaton* (or in *Carabell,* or *Rapanos I or II*), that dirt even left the sites at issue. Nonetheless, to mobilize its expansive "hydrological connection" theory over non-navigable features, the Fourth and Sixth Circuits have found it unnecessary to justify CWA jurisdiction by requiring an actual discharge of pollutants to navigable waters.

* * *

The divergent tests proffered by the courts of appeals can be understood as analogous to variant levels of causation. The loosest causal relationship is represented by the Fourth and Sixth Circuit's "but for" approach, where non-navigable features are deemed jurisdictional because they are geographically near (but isolated from) navigable waters, or because water in non-navigable features may potentially reach "navigable waters" via a remote hydrologic connection. The Second Circuit has established a more proximate approach as the basis for CWA jurisdiction, requiring an addition of pollutants (not simply physical closeness or a possible contribution of hydrology) to navigable waters.[9] And the Fifth Circuit requires the highest causal nexus, extending CWA authority only over actually navigable waters and non-navigable features that physically touch them. This Court is uniquely well-equipped to assist the lower courts with "difficult questions of proximity and degree," and has done so particularly with regard to the scope of regulatory jurisdiction under federal environmental laws. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.,* 515 U.S. 687, 708 (1995). *See also id.* at 712-

---

[9] *See* W. Page Keeton *et al., Prosser and Keeton on Torts* §§ 41-42 (5th ed. 1984) (discussing the various connections between an act and damage "caused" by the act).

713 (O'Connor, J., concurring) (using concept of proximate cause to sustain Endangered Species Act "harm" regulation, based on the regulation's textual requirement of "actual[]," as opposed to possible, death or injury to species). Respectfully, the Court should issue the writ of *certiorari* to clarify the level of "proximity and degree" that a non-navigable feature must bear in relation to a "navigable water," before the Corps and EPA can assert the awesome authority they possess under the CWA.

II. THE CONFUSION CREATED BY THE REGULATORY AGENCIES IN THE FIELD SHOULD COMPEL THIS COURT'S INVOLVEMENT.

A. Congress Has Recognized the Agencies' Haphazard Implementation of "Navigable Waters" Jurisdiction.

Congress and the agencies have continually struggled with the extent of CWA jurisdiction ever since this Court's 2001 decision in *SWANCC*. Indeed, Congress held a hearing on the regulatory implications of *SWANCC*, which led to a promise from the Corps and EPA that they would clarify the scope of CWA jurisdiction to benefit both their field offices and the regulated community. But the agencies have broken their promise. They have issued no meaningful regulatory guidance to date, and none is expected or forthcoming.

In 2002, the House Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, chaired by Representative Doug Ose, held a hearing concerning EPA and Corps implementation of this Court's *SWANCC* decision. *See Agency Implementation of the SWANCC*

Decision: Hearing Before the Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the Comm. on Gov't Reform, No. 107-230, 107th Cong. 2d Sess. (2002) (statement of Rep. Doug Ose, Chairman) ("Subcomm. Hearing"). During that hearing, Representative Ose recognized that the agencies' different approaches to determining CWA jurisdiction have "resulted in widely varying interpretations of the scope of jurisdiction...." *Id.* at 2. Furthermore, Representative Ose explained that the "current situation is creating confusion and chaos" for the States,[10] because the lack of agency guidance "hinders States in their ability to implement their own programs to protect wetlands." *Id.* To address the confusion, the EPA and Corps repeatedly agreed to conduct a rulemaking to clarify their position regarding CWA jurisdiction. Subcomm. Hearing at 32, 36, 38, 41, 53.

Things appeared hopeful in 2003, when the Corps and EPA issued an Advanced Notice of Proposed Rulemaking to "ensure that the regulations are consistent with the CWA and the public understands what waters are subject to CWA jurisdiction." Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1993 (January 15, 2003) ("ANPR"). The agencies recognized that their

---

[10] *See also* Brief of *Amici Curiae* of the Building Industry Legal Defense Foundation, *et al.* in Support of Petitioners at 2-8, *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701). *Amici Curiae* discussed specific examples of how regulators in California are "improperly asserting jurisdiction under the CWA." *Id.* at 2. They included in their brief a series of examples such as: (1) regulating a "vertical-walled box culvert as waters of the United States that are swimmable"; and (2) declaring that a municipal storm sewer system, including streets, curbs, and gutters, are CWA navigable waters. *Id.* at 5-7.

current regulations were causing confusion and that they needed to develop new regulations to "clarify[] what waters are subject to CWA jurisdiction." *Id.*

However, after receiving thousands of pages of public comments, the agencies announced that they would not move forward with rulemaking or otherwise issue any guidance at all to clarify the confusion. Through a press release, the EPA and Corps declined further agency action, stating:

> After soliciting public comment to determine if further regulatory clarification was needed, the EPA and Corps have decided to preserve the federal government's authority to protect our wetlands. The agencies will continue to monitor implementation of this important program to ensure its effectiveness.

See Press Release, Environmental Protection Agency and U.S. Army Corps of Engineers, EPA and Army Corps Issue Wetlands Decision (December 16, 2003), *available at* http://www.epa.gov/newsroom. The confusion still exists without any expected schedule for clarification from these agencies.

In light of the abandoned rulemaking on *SWANCC*, and without this Court's review, the lower courts have become the final arbiters on the scope of CWA jurisdiction. But, as shown above, they are in a state of disarray. Everyone – including the agencies – will anticipate and scrutinize every federal trial and circuit court opinion in the absence of reasoned agency decision-making. Indeed, the ANPR itself documented the divergent judicial views concerning those water bodies that are regulated under the

CWA and those that are not. In a blatant abdication of their responsibilities, the Corps and EPA directed their field staff to make jurisdictional decisions on a "case-by-case basis" by "considering the relevant court decisions." 68 Fed. Reg. 1991, 1998.

B. The General Accounting Office Has Reported on Rampant Regulatory Inconsistencies.

The U.S. General Accounting Office ("GAO") has issued a report confirming Congress's findings of regulatory inconsistency. *See* Report to the Chairman, Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs, Comm. on Government Reform, House of Representatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction,* GAO-04-297 (Feb. 27, 2004) (GAO Report).[11]

The GAO Report identifies and documents the different and often contradictory approaches, both among and within the Corps's districts, regarding whether a particular non-navigable feature qualifies as a "tributary" or an "adjacent" wetland. *Id.* at 20-22 and 17-20.[12] In addition, the GAO Report concludes that there is no consistency within the Corps on whether ditches and other man-made conveyances are subject to federal regulation.

---

[11] Available at http://www.gao.gov/new.items/d04297.pdf.

[12] *See, e.g.*, GAO Report at 3 ("Districts apply different approaches"); *id.* ("differences in identifying jurisdictional limits"); *id.* at 4 (districts need "[t]o provide greater clarity to the regulated community"); *id.* at 18 ("districts varied"); *id.* at 20 (districts "could differ significantly"); *id.* at 23 ("three different district staff" would probably make "three different assessments"); *id.* at 25 ("contrast" among districts).

Id. at 22-26. In effect, the GAO Report confirms that the Corps does not know what the word "tributary" means, or how to identify a "tributary" or an "adjacent" wetland in the field with any predictability or consistency. Furthermore, GAO found that few Corps districts actually disclose "their practices for making jurisdictional determinations to the public." GAO Report at 27.

Consequently, we are left with an inconsistent patchwork of jurisdictional determinations that is wholly unsupported by any rulemaking record or other documentation. Such ad hoc decision-making is precisely the kind of situation where *Chevron* deference is not due.[13] With no federal agency plans for a future rulemaking, and with the courts of appeal in conflict, the sole remaining venue to resolve these issues is this Court.

C. Whether Federal Regulators Assert CWA Jurisdiction Now Depends on the Geographic Jurisdiction of the Various Courts of Appeal, Not on a Consistent Regulatory Program.

Because the agencies have relied on divergent court decisions to direct the public, landowners are now confronted with geographically disparate applications of the CWA. This subjects them to significant criminal and civil penalties based solely upon where their land is situated. Thus, landowners in the Sixth and Fourth Circuit states of Kentucky, Michigan, Ohio, Tennessee, Maryland, Virginia, North Carolina, South Carolina and West Virginia are subject to over-regulation because federal jurisdiction is

---

[13] *See, e.g., Chevron, U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). The Fourth Circuit determined that *Chevron* deference was appropriate and held that "the word 'tributaries' ... means what the Corps says it means." *Deaton,* 332 F.3d at 711.

triggered if their property has "mere proximity," "some connection," or is "hydrologically connected," to traditionally navigable waters.

By contrast, areas in the Fifth Circuit states of Mississippi, Louisiana and Texas will be regulated under the CWA only if they physically abut an actually navigable water. And landowners in the Second Circuit states (New York, Connecticut, and Vermont) will be regulated not through the hydrological connection test, but only where pollutants are shown to migrate off their properties and result in an actual discharge to navigable waters.

CONCLUSION

The Sixth Circuit's opinion in *Carabell* does nothing to clarify this mess. Indeed, its "mere proximity" theory adds yet another "test" overall, and two within its own circuit.

The Supreme Court's involvement is urgently needed so the Corps can regulate with consistency and property owners know, up front, if the arm of the federal government properly reaches their land and triggers CWA permitting and penalty requirements.

DATED: May 13, 2005

Respectfully submitted,

Duane J. Desiderio*
Thomas J. Ward
Felicia K. Watson
National Association of Home Builders
**Counsel of Record*